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No. 01-0381

Supreme Court, U.S.
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In The

# Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

*Petitioners,*

v.

GREAT NORTHERN PAPER, INC.; GEORGIA-PACIFIC CORPORATION; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

*Respondents.*

**On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court**

## RESPONDENT STATE OF MAINE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether application of Maine's Freedom of Access Act, 1 Me.Rev.Stat.Ann. §§ 401, *et seq.*, to the Penobscot Nation and Passamaquoddy Tribe requiring those tribes to disclose documents provided to or received from non-tribal governmental entities relating to certain environmental issues, violates the "internal tribal matters" language of the Act to Implement the Maine Indian Claims Settlement, 30 Me.Rev.Stat.Ann. §§ 6201, *et seq.*, as ratified by Congress in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721, *et seq.*

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## MAINE'S BRIEF IN OPPOSITION

Respondent, State of Maine, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Decision and Judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court") issued on May 1, 2001, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1-30 and reported at *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (Me. 2001). At the outset, it is critical to have a clear understanding of the controversy and decisions below.

The Law Court construed the federal and state statutes that memorialized the settlement between the Maine Tribes, the United States and the State of Maine, concluding that Maine's Freedom of Access Act, 1 Me.Rev.Stat.Ann. §§ 401, *et seq.* "does not apply to the Tribes' internal governmental proceedings" and therefore held that the Tribes were not required to turn over notes, agendas, minutes and other "internal" tribal documents. (Pet. App. at 32-33.) The Law Court, however, also found that "[w]hen the Tribes, in their municipal capacities, act or interact with persons or entities other than their tribal membership, such as the state or federal government, the Tribes may be engaged in matters that are not 'internal tribal matters.' " (Pet. App. at 29.) In the specific context of this case, the Law Court required the Tribes to produce documents sent to or received by the state and federal government related to certain environmental issues. (Pet. App. at 32.)

The Law Court did not decide, and neither the private parties nor the State of Maine pressed, any right to

intrude onto or into the Tribes' reservations under Maine's Freedom of Access Law. Because such an alleged intrusion appears to be at the heart of the Petition for Writ of Certiorari, the Petition should be denied.

## STATEMENT OF FACTS

### I. HISTORY OF THE SETTLEMENT ACTS.

During the 1970's, the Penobscot Nation and the Passamaquoddy Tribe pursued claims to nearly two-thirds of the landmass of the State of Maine. *See generally Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975); *see also Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979). In 1980, after what the First Circuit described as "years of strife," the Federal Government, the Tribes, and the State of Maine negotiated a comprehensive settlement of the claims. *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996). The settlement is embodied in a state legislative enactment known as "An Act to Implement the Maine Indian Claims Settlement" (the "State Implementing Act") found at 30 Me.Rev.Stat.Ann. §§ 6201, *et seq.*, and the Act of Congress known as the "Maine Indian Claims Settlement Act of 1980" found at 25 U.S.C. §§ 1721, *et seq.* (the "Federal Settlement Act"). The Penobscots and Passamaquoddies specifically agreed to this settlement.

The Settlement and Implementing Acts, as understood and intended by Congress, the Maine Tribes and the State of Maine, were *sui generis*. Since Maine's entry into the Union in 1820, the federal government rejected and refused any responsibility for the Maine Tribes. 25

U.S.C. § 1721(a)(9). Thus, the State actively regulated the affairs of Indians within its borders for over 150 years, creating hundreds of laws that specifically related to the protection and regulation of the Tribes. *See, e.g.*, 22 Me.Rev.Stat.Ann. §§ 4701-4836 (1964) (detailing rules and regulations that applied to the Tribes) repealed in substantial part by the Maine Implementing Act, P.L. 1979, ch. 732; *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 374 (1st Cir.), *affirming*, 388 F.Supp. 649, 652-53 (D.Me. 1975). The Maine Tribes were not recognized by the state or federal government in any official or "political sense." *State v. Newell*, 24 A. 943, 944 (Me. 1892); *see also Indian Township Passamaquoddy Reservation Housing Authority v. Governor of State*, 495 A.2d 1189, 1190 (Me. 1985). There was no established tribal sovereignty, and Indians residing within Maine's borders were subject to the general laws of Maine like "any other inhabitants" of Maine. *State v. Newell*, 24 A. at 944; *Murch v. Tomer*, 21 Me. 535, 537 (1842). Not until the 1970's did the federal courts conclude that the Maine Tribes retained attributes of sovereignty. *Bottomly*, 599 F.2d at 1061; *Morton*, 528 F.2d at 380. These new conclusions spurred the Tribes, the federal government and the State of Maine to resolve the Tribes' land claims as well as their jurisdictional relationship.

The Settlement and Implementing Acts were "designed to transform the legal status of the Maine Tribes . . . and to create a unique relationship between state and tribal authority" (*Passamaquoddy Tribe v. State of Maine*, 75 F.3d at 787), and were intended to definitively resolve land claims and jurisdictional disputes. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 487-89 (Me.) (McKusick,

C.J.), *appeal dismissed for want of a substantial federal question*, 464 U.S. 932 (1983). During the negotiations leading up to the ultimate settlement, Maine consistently took the position that it would never accept the concept of a "nation within a nation" and that state law should apply to the Indians as it does to every citizen in the state. *Proposed Settlement of Indian Land Claims: Hearings before the Select Committee on Indian Affairs*, 96th Cong. Vol. 1 at 139 (Testimony of Governor Brennan, July 1, 1980).

The Federal Settlement Act ratified and confirmed the jurisdictional relationship between the Tribes and the State. The Tribes, their members, natural resources and land "shall be subject to the civil and criminal jurisdiction of the State, laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." 25 U.S.C. § 1725(a). Congress went on to specifically subject the Tribes "to the jurisdiction of the State of Maine to the same extent and in the manner provided in the Maine Implementing Act and the Act is hereby approved, ratified and confirmed." 25 U.S.C. § 1725(b)(1). The fundamental cornerstone of the settlement is contained in the Maine Implementing Act, as follows:

> Except as otherwise provided in this Act, all Indians, Indian nations and tribes and bands of Indians in the State, and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity, *shall be subject to the laws of the State*, and to the civil and criminal jurisdiction of the courts of the State *to the same extent as any*

> *other person or lands or other natural resources therein.*

30 Me.Rev.Stat.Ann. § 6204 (emphasis added). This provision is the foundation of the relationship between the Tribes and the State of Maine. The Tribes "adopt[ed] the laws of the State as their own to the extent provided in" the Maine Implementing Act (30 Me.Rev.Stat.Ann. § 6202), and agreed to be subject to suit in the courts of the State "to the same extent as any other entity or person in the State." 30 Me.Rev.Stat.Ann. § 6206(2); *see also* 25 U.S.C. § 1725(d)(1) (Maine Tribes "may sue and be sued in the courts of the State of Maine and the United States").

Pursuant to the State Implementing Act, the Tribes have all of the powers, rights, and immunities, as well as all the duties and obligations of municipalities in Maine subject to the specific exception that "internal tribal matters" are exempt from regulation by the State:

> Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund

> income shall not be subject to regulation by the State.

30 Me.Rev.Stat.Ann. § 6206(1). This "innovative blend of customary State law respecting units of local government with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing," was recognized as being "original" in its treatment of the Penobscot Nation and the Passamaquoddy Tribe in their relationship to the State of Maine. *Committee Report of the Senate Select Committee on Indian Affairs Concerning the Settlement Act*, S.Rep.No. 96-957 at 29 (1980). According to the Penobscot Nation's counsel at the time, the governmental relationship between Indians and non-Indians was "unlike that which exists anywhere else in the United States." *Transcript of March 28, 1980 Public Hearing before Joint Committee on Indian Land Claims*, 28 (1980) (Testimony of Thomas Tureen, Esq.), *reprinted* at *Penobscot Nation v. Stilphen*, 461 A.2d at 488.

The unique relationship created by the State Implementing Act was expressly approved, ratified, and confirmed by Congress. 25 U.S.C. §§ 1721(b)(3) and 1725(b)(1). Indeed, Congress went even further to emphasize the preeminent place state law occupies in the settlement and in the relationship between the Tribes and the State of Maine. The Federal Settlement Act provides that the laws and regulations of the United States that are generally applicable to Indians, are not applicable to the Passamaquoddy Tribe and Penobscot Nation insofar as such federal laws or regulations "affect or preempt the civil, criminal or regulatory jurisdiction of the State of Maine." 25 U.S.C. § 1725(h). Moreover, any federal laws enacted after October 10, 1980 (the effective date of the

Federal Settlement Act) that would effectively preempt the application of the laws of the State of Maine, do not apply within the State of Maine unless specifically and expressly made applicable to the State. 25 U.S.C. § 1735(b); *see generally Passamaquoddy Tribe v. State of Maine*, 75 F.3d at 787. The "Settlement Act . . . submitted the Passamaquoddies, Penobscots, and the tribal lands to the State's jurisdiction," and "gave the State a measure of security against future federal incursions upon these hard-won gains."[1] *Passamaquoddy Tribe v. State of Maine*, 75 F.3d at 787; *see Akins v. Penobscot Nation*, 130 F.3d 482, 484-85 (1st Cir. 1997) (nation is subject to the laws of Maine with very limited exceptions); *Penobscot Nation v. Stilphen*, 461 A.2d at 482 ("internal tribal matter" is a "narrow sphere"); *see also Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999).

## II. HISTORY OF THIS LITIGATION.

The present petition has been submitted in the context of an effort by the Maine Tribes to assert environmental regulatory authority, both inside and outside of their territories. In particular, the State of Maine has requested from the federal Environmental Protection Agency ("EPA") permitting authority under the National

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[1] At the time the Federal Settlement Act was considered by Congress, the Secretary of the Interior understood that the settlement was intended "to effectuate the broad assumption of jurisdiction over Indian lands by the State of Maine." *Proposed Settlement of Indian Claims: Hearings before the Select Committee on Indian Affairs*, 96th Cong. Vol. I at 101 (Letter, Interior Secretary Andrus to Senator Melcher, Chairman, August 8, 1980).

Pollutant Discharge Elimination System ("NPDES") program for the entire state. The EPA is the federal entity that has the power to delegate NPDES authority to a state. 33 U.S.C. § 1342. The Maine Tribes and the federal Department of the Interior, however, have opposed that delegation, suggesting that general trust considerations require that the Tribes, either directly or indirectly, have environmental regulatory authority regarding their territory as well as watersheds affecting them.[2] Indeed, the Penobscot Nation presented to the EPA a list of numerous off-reservation facilities the Tribe could control if NPDES authority over Indian territory is carved out for the Tribes.

EPA has issued a partial decision delegating to Maine permitting authority over all parts of the State except for "Indian Country." 66 F.R. 12791 (February 28, 2001). A decision on the status of Indian Country was, and remains, delayed pending an opinion from the Department of Justice. *Id.* at 12792-93.[3]

During the NPDES decision-making process, Great Northern Paper, Inc. and other private non-Indian parties (the Respondent-Companies) and the State of Maine discovered "Tribal Environmental Agreements" between the EPA and the Maine Tribes. The EPA confirmed that the

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[2] The Tribes, the Department of Interior, and the State of Maine disagree on, *inter alia*, the boundaries of the Indian reservations in Maine as well as the nature of the trust relationship between the federal government and the Maine Tribes under the Settlement and Implementing Acts.

[3] It is likely that any final decision by the EPA will be appealed to the courts.

State had never been apprised of such agreements and had no input into them. The Agreements appear to attempt to resolve many of the underlying issues of trust responsibility and tribal sovereignty in a manner with which the State of Maine disagrees. Contained in the Agreements is a "confidentiality" provision requiring the parties, including the EPA, to treat all communications as confidential and to use their best efforts not to reveal them.

This discovery prompted the Respondent-Companies to serve a Freedom of Access request under Maine law seeking various documents from the Tribes regarding their environmental efforts. The Maine Freedom of Access Act has a variety of components, including access to documents and open meetings. 1 Me.Rev.Stat.Ann. §§ 401, *et seq.* Neither the Federal Settlement Act, the State Implementing Act, nor the Maine Freedom of Access Act specifically addresses the applicability of the Freedom of Access Act to the Tribes. The Tribes responded to the request by asserting that the Maine Freedom of Access Act does not and cannot be applied to them because, they claimed, the circumstances under which the Tribes disclose documents belonging to them involves an "internal tribal matter." The State of Maine did not make any request for documents from the Tribes but did serve a Freedom of Information Act request upon the EPA for documents relating to its relationship with the Tribes.

The Tribes and the Respondent-Companies then each filed suit. On May 18, 2000, the Tribes filed an action in the United States District Court for the District of Maine seeking to enjoin the Respondent-Companies from using the Maine Freedom of Access Act against the Tribes.

*Penobscot Nation v. Georgia-Pacific Corp.*, 106 F.Supp.2d 81 (D.Me.), *reconsideration denied*, 116 F.Supp.2d 201 (D.Me. 2000), *aff'd*, 254 F.3d 317 (1st Cir. 2001). Four days later, on May 22, 2000, the Respondent-Companies filed a Freedom of Access Act complaint pursuant to Maine law in the Maine Superior Court. The State of Maine became an intervenor in both the federal and state lawsuits.

On July 19, 2000, the District Court dismissed the Tribes' complaint under the well-pleaded complaint rule. *Penobscot Nation v. Georgia-Pacific Corp.*, 106 F.Supp.2d 81. The Tribes' motion for reconsideration was also denied by the District Court. *Penobscot Nation v. Georgia-Pacific Corp.*, 116 F.Supp.2d 201. The Tribes filed a timely appeal of that decision to the Court of Appeals for the First Circuit.

On September 18, 2000, after the United States District Court had dismissed the Tribes' federal complaint, Justice Robert E. Crowley of the Maine Superior Court, following full briefing and argument, found that the Tribes may be subject to the public records provisions of the Maine Freedom of Access Act and that the particular documents sought by the Respondent-Companies did not involve or implicate any "internal tribal matter" within the meaning of 30 Me.Rev.Stat.Ann. § 6206(1). (Pet. App. at 67-76). The court required the Tribes "to turn over all non-privileged documents as well as logs of all documents claimed to be privileged no later than 14 days from the date of this Order." (Pet. App. at 76).

The Tribes, however, failed and refused to comply with the order in any way and did not appeal it prior to the expiration of the 14-day period. The Respondent-

Companies then moved for the entry of final judgment and for contempt. The State, as an intervenor, took no position on the contempt motion. Final judgment was entered by the court. An evidentiary hearing on the motion for contempt was scheduled for November 9, 2000. The Superior Court, however, indicated that all proceedings related to that motion would be stayed if the Tribes appealed to the Maine Law Court.

On October 31, 2000, the Tribes and their leaders filed another complaint in the United States District Court, this time against Justice Crowley seeking to enjoin him "from in any way compelling the Tribes to submit to" the Maine Freedom of Access Act. *Penobscot Nation v. Crowley*, U.S.D.C. No. CV-00-222. The District Court (Carter, J.) denied the Tribes' request for relief, and shortly thereafter, the Tribes dismissed the action without prejudice.

On November 9, 2000, a contempt hearing was held before Justice Crowley. The Tribes had made no effort to comply with the court's order of September 19, 2000 and had not filed an appeal to the Maine Law Court, giving no indication that they would do so. Following an evidentiary hearing, the Superior Court found the Tribes and their leaders in contempt and ordered coercive imprisonment and fines, all of which the Superior Court agreed to stay during any appeal to the Maine Law Court.

Finally, the Tribes filed a timely appeal to the Maine Law Court. Following oral argument and full briefing, the Maine Law Court issued its Decision on May 1, 2001 (Pet. App. at 1). The court found that the Federal Settlement Act, the State Implementing Act, and the Maine Freedom of Access Act, did not provide specific language dealing

with the applicability of the Freedom of Access Act to the Tribes. The court therefore looked to the legislative history of the Federal Settlement and State Implementing Acts, and recent explications of the meaning of the phrase "internal tribal matters" by the First Circuit in *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997) and *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999).

The court applied the analysis suggested by those cases, contemplating consideration of five factors, and concluded that in general the Maine Freedom of Access Act "is not ordinarily applicable to the methods and actions by which the Tribes engage in self-governance," and in addition would not apply where the Tribes act in their "corporate or other nongovernmental capacities." (Pet. App. at 27-28). The court did not determine the "full parameters of the instances where the [Maine Freedom of Access] Act will not apply to the Tribes," but did find that "internal tribal matters" include the deliberative processes of self-governance (including internal discussions, votes, and methods to reach decisions along with documents generated in the process) and that application of the Freedom of Access Act to such "internal tribal affairs would constitute an impermissible imposition of state laws on the Tribes' exclusive right to regulate their 'tribal government.' " (Pet. App. at 27-28).

On the other hand, the Law Court ruled that when "decisions made in the course of tribal governance find their way to actions and interactions with others outside of the Tribes . . . the Tribes will ordinarily be deemed to have moved outside of internal tribal matters." (Pet. App. at 29.) The Law Court concluded further that the "effort

of the Tribes to obtain a position on a par with state government regarding the regulation of water quality" would have a direct effect outside of the Tribes and that *some* documents related to that effort "are not internal tribal matters." (Pet. App. at 29). Because the "relationship between the State and the Tribes regarding the regulation of water quality within the State is a matter of legitimate interest to the citizens of Maine," "the Tribes' communications with the federal or state government in the context of their water quality authority are not matters internal to the Tribes, and are subject to the public records provisions of the Freedom of Access Act." (Pet. App. at 29-30). The court vacated the judgment of contempt, and remanded the matter to the Superior Court for further proceedings consistent with the opinion.

On June 20, 2001, the Court of Appeals for the First Circuit affirmed the United States District Court decision on *res judicata* grounds. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317 (1st Cir. 2001). The First Circuit recognized that the Maine Tribes "occupy a status, and are subject to a legal framework, that is atypical." *Id.* at 320. That court correctly observed that "the State of Maine, as part of the settlement, obtained legal authority over the Tribes exceeding the usual state authority over Native American tribes. The Tribes were for most purposes 'subject to all the laws of the State of Maine,' " and are generally "made subject to suit in state courts." *Id.* (*quoting* 25 U.S.C. § 1721(b)(4)). The First Circuit discussed, without deciding, whether there was a federal claim cognizable in the Settlement and Implementing Acts. *Id.* at 322-23. Because the Maine Law Court had full jurisdiction to decide the issues raised in this litigation and did so,

the Court of Appeals found it unnecessary to resolve the federal claim question, since well-established principles of *res judicata* applied. *Id.* at 323-24.

On remand in the state court, the Tribes have sought a stay, which the State of Maine has supported. The Superior Court has proposed an order staying the actual production of documents pending consideration of this petition by this Court, but requiring the Tribes to identify and assemble for production and review those documents the Law Court described as being subject to the Maine Freedom of Access Act.

## REASONS FOR DENIAL OF THE WRIT

There is no compelling reason for the Court to review the Maine Law Court's decision in this case. First, the proposed issues presented by the Petition were not resolved by or disputed before the court below. The Law Court below did not mandate, and neither the Respondent-Companies nor the State of Maine as intervenor have sought, intrusion onto or into the Tribes' reservations. In any case, the issue presented is not one of nationwide impact. Second, there is no conflict between the First Circuit and the Maine Law Court on the factors to be considered in determining whether a particular matter is an "internal tribal" one, or that the Maine State courts have jurisdiction to resolve such issues. Indeed, the federal and state courts are in agreement on these issues. Finally, it remains unclear whether there is a substantial federal question here, and without a resolution of that issue below, it is premature to grant this petition.

## I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUE PETITIONERS PRESENT TO THE COURT IS NOT PROPERLY FRAMED.

The Petitioners' "questions presented" are couched in terms of physical "entry into the Tribes' reservations" and the "public's intrusion into the reservations." Petition at i. The Maine Law Court's decision, however, is devoid of any finding, conclusion or even hint, mandating entry into the reservations by the public. On the contrary, the Law Court held that "the Tribes' internal discussions, votes, and decision making . . . are processes entirely internal to the Tribes" and "[n]either the State nor the general public has the right to be involved in, or sit in on, that internal decision-making process." (Pet. App. at 28). Simply put, there has been no holding by the court below that the general public, or for that matter the State, can intrude upon the reservation to attend tribal functions or obtain any documents. Moreover, neither the Respondent-Companies nor the State of Maine have argued for such a result. The Respondent-Companies have sought only access to the available documents, at a location of the Tribes' choosing. The issue proffered by the Tribes is one that has not been raised before or decided by the court below, and thus should not be reviewed by this Court.

Moreover, the issue presented is not one of nationwide import, because it has no impact elsewhere. The relationship between the Tribes and the State of Maine was confirmed by Congress. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribal rights are subject to the plenary authority of Congress to limit the sovereignty and rights of the Tribe); *United States v. Wheeler*, 435 U.S.

313 (1978) (tribal sovereignty may be eliminated by statute). The meaning of the phrase "internal tribal matters" as used in the unique Federal Settlement and State Implementing Acts, and whether it applies to a document request under Maine's Freedom of Access Act, has no effect outside of Maine. *Compare, Department of Interior v. Klamath Water Users,* 532 U.S. 1 (2001) (determining Federal Freedom of Information Act's general applicability to tribal documents).

## II. THERE IS NO CONFLICT BETWEEN THE FIRST CIRCUIT AND THE MAINE LAW COURT.

In a series of decisions, the Court of Appeals for the First Circuit has provided a calculus to be used when determining whether the "internal tribal matters" exemption applies to a particular circumstance. That court suggests consideration of such factors as: (1) whether only tribal matters are regulated; (2) whether only tribal lands are at issue; (3) whether only the tribes' ability to regulate its natural resources is involved; (4) whether the interests of the State of Maine are implicated or impaired; and (5) consistency with prior legal understandings. *Penobscot Nation v. Fellencer,* 164 F.3d at 709; *Akins v. Penobscot Nation,* 130 F.3d at 486-87. The Petitioners specifically urged the Maine Law Court to apply those factors, and that court did so. (Pet. App. at 88).

In applying the *Akins/Fellencer* factors, the Maine Law Court struck the appropriate balance by recognizing that the Maine Tribes may act "internally" as Tribes and may also exercise governmental power more broadly by affecting non-tribal members. When the Tribes act internally as

Indian Tribes, the Maine Freedom of Access Act has no application. When, however, the Tribes interact with non-tribal members or entities, they are subject to the obligations and duties of a municipality in Maine, including, in limited circumstances, certain requirements of the Maine Freedom of Access Act. This very balance is precisely what makes the jurisdictional relationship between the Maine Tribes and the State of Maine so unique and "original." And that balance is precisely what was contemplated by the historic Federal Settlement and State Implementing Acts.

The First Circuit and the Maine Law Court agree that the Maine Law Court has the jurisdiction, under the clear language of the Federal Settlement and State Implementing Acts, to interpret those Acts and, specifically, to resolve the issues raised in this litigation. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d at 320; *Great Northern Paper, Inc. v. Penobscot Nation*, at Pet. App. at 6, n.3. The First Circuit applied *res judicata* principles acknowledging the Law Court's jurisdiction to decide the case. In short, there is no conflict.

## III. THE DOUBT AS TO WHETHER A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED HERE SUPPORTS DENIAL OF THE PETITION.

Previously, this Court has dismissed a petition for writ of certiorari relating to the interpretation of the Maine Implementing Act for want of a substantial federal question. *Penobscot Nation v. Stilphen*, 461 A.2d 478 (Me.) (McKusick, C.J.), *appeal dismissed for want of substantial federal question*, 464 U.S. 923 (1983). On the precise issue

of whether the "internal tribal matter" exception applies in this particular situation, the First Circuit itself has raised doubts as to whether a federal question or claim is involved. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d at 321-23. This creates yet another cloud on the presentation of this case, supporting denial of the writ.

## CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# MAINE FREEDOM OF ACCESS LAW

## 1 Me. Rev. Stat. Ann. §§ 401 & 408

### § 401. Declaration of public policy; rules of construction

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

### § 408. Public records available for public inspection

Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record; provided that, whenever inspection cannot be accomplished without translation of mechanical or electronic data compilations into some other form, the person desiring inspection may be required to pay the State in advance the cost of translation and both translation and inspection may be scheduled to occur at such time as will not delay or inconvenience the regular activities of the agency or official having custody of the record sought and provided

further that the cost of copying any public record to comply with this section shall be paid by the person requesting the copy.

## STATE IMPLEMENTING ACT

### 30 Me. Rev. Stat. Ann. § 6202

§ 6202. Legislative findings and declaration of policy

The Legislature finds and declares the following.

The Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians are asserting claims for possession of large areas of land in the State and for damages alleging that the lands in question originally were transferred in violation of the Indian Trade and Intercourse Act of 1790, 1 Stat. 137, or subsequent reenactments or versions thereof.

Substantial economic and social hardship could be created for large numbers of landowners, citizens and communities in the State, and therefore to the State as a whole, if these claims are not resolved promptly.

The claims also have produced disagreement between the Indian claimants and the State over the extent of the state's jurisdiction in the claimed areas. This disagreement has resulted in litigation and, if the claims are not resolved, further litigation on jurisdictional issues would be likely.

The Indian claimants and the State, acting through the Attorney General, have reached certain agreements which represent a good faith effort on the part of all parties to achieve a fair and just resolution of those

claims which, in the absence of agreement, would be pursued through the courts for many years to the ultimate detriment of the State and all its citizens, including the Indians.

The foregoing agreement between the Indian claimants and the State also represents a good faith effort by the Indian claimants and the State to achieve a just and fair resolution of their disagreement over jurisdiction on the present Passamaquoddy and Penobscot Indian reservations and in the claimed areas. To that end, the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State.

30 Me. Rev. Stat. Ann. § 6204

§ 6204. Laws of the State to apply to Indian Lands

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 Me. Rev. Stat. Ann. § 6206(1) & (2)

§ 6206. Powers and duties of the Indian tribes within their respective Indian territories

1. General Powers. Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State applicable to the respective Indian territories and the residents thereof. Any resident of the Passamaquoddy Indian territory or the Penobscot Indian territory who is not a member of the respective tribe or nation nonetheless shall be equally entitled to receive any municipal or governmental services provided by the respective tribe or nation or by the State, except those services which are provided exclusively to members of the respective tribe or nation pursuant to state or federal law, and shall be entitled to vote in national, state and county elections in the same manner as any tribal member residing within Indian territory.

2. Power to sue and be sued. The Passamaquoddy Tribe, the Penobscot Nation and their members may sue and be sued in the courts of the State to the same extent

as any other entity or person in the State provided, however, that the respective tribe or nation and its officers and employees shall be immune from suit when the respective tribe or nation is acting in its governmental capacity to the same extent as any municipality or like officers or employees thereof within the State.

. . . .

MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980

25 U.S.C. § 1721(a)(9) & (b)(3)

§ 1721. Congressional findings and declaration of policy

(a) Findings and declarations

Congress hereby finds and declares that:

. . . .

(9) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. During this same period, the United States provided few special services to the respective tribe, nation, or band, and repeatedly denied that it had jurisdiction over or responsibility for the said tribe, nation, and band. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this claims settlement.

. . . .

(b) Purposes

It is the purpose of this subchapter –

. . . .

(3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation . . .

. . . .

25 U.S.C. § 1725(a), (b)(1), (d)(1) & (h)

§ 1725. State laws applicable

(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State

Except as provided in section 1727(e) and section 1724(d)(4) of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing

services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

. . . .

(d) Capacity to sue and be sued in State of Maine and Federal courts; section 1362 of title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and section 1362 of title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: Provided, however, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act.

. . . .

(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine

Except as other wise provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

25 U.S.C. § 1735

§ 1735. Construction

(a) Law governing; special legislation

In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern.

(b) General legislation

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or

tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.